MATTER OF R-C- INC.

DATE: MAY 12, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a manufacturer and seller of avionic products, seeks to employ the Beneficiary as a systems engineer. It seeks classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act), section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition on October 30, 2015. The Director concluded that the record did not establish the Beneficiary's qualifying experience for the offered position. The matter is now before us on appeal. The Petitioner asserts that the Director misinterpreted the position's job requirements. Upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

A. The Roles of DOL and USCIS in the Immigrant Visa Process

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, U.S. Citizenship and Immigration Services (USCIS) must approve an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, the foreign national must apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the DOL, accompanies the instant petition. By approving the labor certification, the DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(II).

In these visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified on a labor certification and the requirements of the requested immigrant

classification. *See* section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that the immigration service has authority to make preference classification decisions).

B. The Beneficiary's Qualifying Experience

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(l), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany*, 696 F.2d at 1012-13; *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the petition's priority date is September 25, 2014, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

The labor certification states the primary requirements of the offered position of systems engineer as a U.S. master's degree or a foreign equivalent degree in electrical engineering or systems engineering, plus 36 months of experience in the job offered.[1] The labor certification states that the Petitioner will not accept experience in an alternate occupation.

The Beneficiary attested on the labor certification to about 40 months of full-time qualifying experience before assuming the offered position with the Petitioner on March 31, 2014. The Beneficiary stated his employment by the Petitioner as a systems engineer from November 15, 2010 to March 30, 2014.

A labor certification employer generally cannot rely on experience that a foreign national gained with it, unless the experience was in a position "not substantially comparable" to the offered position, or the employer demonstrates the infeasibility of training another worker for the position. 20 C.F.R. §§ 656.17(i)(3)(i), (ii). A "substantially comparable" position means a job "requiring performance of the same job duties more than 50 percent of the time." 20 C.F.R. § 656.17(i)(5)(ii).

[1] Part H.14 of the ETA Form 9089 also states 10 "other requirements" for the offered position. However, in a March 26, 2015, letter, the Petitioner states an eleventh requirement. The record is therefore unclear whether the ETA Form 9089 states the "actual minimum requirements" of the offered position. *See* 20 C.F.R. § 656.17(i) (stating that "[t]he job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity").

In the instant case, the Petitioner claims and the record indicates that the Beneficiary's qualifying experience with the Petitioner was in a position not substantially comparable to the offered position. The Petitioner submitted evidence that the Beneficiary's prior position as a systems engineer focused on direct programming and software verification for aircraft management flight systems. The record shows that the offered position of systems engineer is in the Petitioner's GPS (Global Positioning System) Navigation department, with most of the position's time spent in an expert support role resolving issues for software teams and customers.

However, as the Director found, because the Beneficiary's prior experience was in a position not substantially comparable to the offered position, he lacks experience in the job offered as specified on the accompanying labor certification. The Beneficiary's prior experience cannot be in the job offered if it was in a position not substantially comparable to the job offered.

The Petitioner indicated on Part H.10 of the accompanying ETA Form 9089 that experience in an alternate occupation is unacceptable. As previously indicated, we may not ignore a term of an accompanying labor certification. *See Irvine*, 699 at 1009; *Madany*, 696 F.2d at 1012-13; *Stewart*, 661 F.2d at 3. Therefore, the labor certification states that the only acceptable experience for the offered position is experience in the job offered. Because the Beneficiary's claimed qualifying experience was in a position not substantially comparable to the job offered, the record does not establish his qualifications for the offered position.

The Petitioner asserts that the Beneficiary's prior experience with the Petitioner, "although substantially non-comparable in nature based on the job duties, was still the same occupation as considered by the U.S. Department of Labor and USCIS guidance." The Petitioner points to USCIS guidance on determining whether jobs are in the "same or similar" occupational classification, which references the DOL's standard occupational classification (SOC) system. *See* U.S. Citizenship & Immigration Servs., "Questions about Same or Similar Occupational Classifications Under the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Apr. 7, 2011" *available at*, https://www.uscis.gov/news/questions-about-same-or-similar-occupational-classifications-underameric an-competitiveness-twenty-first-century-act-2000-ac21 (accessed Apr. 18, 2016). Because both the Beneficiary's prior position and the offered position are in the same occupational classification under the SOC, the Petitioner asserts that the Beneficiary's prior experience was in the job offered.

However, the USCIS guidance cited by the Petitioner is used for determining "same or similar" occupational classifications for "portability" purposes under AC21. *See* section 204(j) of the Act (stating that petitions shall remain valid for beneficiaries who changed jobs if their applications for adjustment of status remained unadjudicated for at least 180 days and their new jobs are "in the same or similar occupational classification as the job for which the petition was filed"). The instant matter does not involve interpreting the statutory language of section 204(j) of the Act for portability purposes. Rather, it involves interpreting the term "experience in the job offered" on a labor certification. We therefore do not find the USCIS guidance cited by the Petitioner to be applicable.

Moreover, contrary to the Petitioner's argument, the DOL does not determine whether a foreign national has "experience in the job offered" by referencing the SOC. Rather, the DOL examines the job duties of the offered and prior positions. *See Matter of Symbion Techs., Inc.*, 2010-PER-01422, 2011 WL 5126284, *2 (BALCA Oct. 24, 2011) (citations omitted) (holding that the term "experience in the job offered" on a labor certification means "experience performing the key duties of the job opportunity, specifically those listed in Question H.11 [of an ETA Form 9089]"); *see also* 20 C.F.R. § 656.17(i)(5)(ii) (stating that a "substantially comparable" position means a job "requiring performance of the same job duties more than 50 percent of the time"). We therefore are not persuaded by the Petitioner's assertion.

The Petitioner also asserts that USCIS lacks authority "to examine or review the employer's requirements for a job opportunity as outlined in a labor certification." The Petitioner states that USCIS may not "impose its own interpretation of the terms of the labor certification."

However, we are not imposing our own interpretation of the terms on the accompanying labor certification. Rather, our interpretation is based on DOL case law and regulations. As the Petitioner states in its appellate brief, "[t]he U.S. Department of Labor is the agency charged with the regulatory authority to examine the employer's actual minimum requirements, and it is therefore the regulations and case law pertinent to the Department of Labor that are controlling upon the four corners of the labor certification and all terms and content therein." We are merely interpreting the terms of the accompanying labor certification pursuant to DOL case law and regulations. We therefore do not overstep our authority in interpreting the experience requirements of the offered position.

II. CONCLUSION

For the foregoing reasons, the record does not establish the Beneficiary's qualifying experience for the offered position as specified on the accompanying labor certification. We will therefore affirm the Director's decision and dismiss the appeal.

In visa petition proceedings, a petitioner bears the burden of establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the instant Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of R-C- Inc.*, ID# 17404 (AAO May 12, 2016)